11-3272-CV

United States Court of Appeals For the Second Circuit

Oneida Indian Nation of New York State, AKA Oneida Indian Nation of New York, AKA Oneida Indians of New York, Oneida Indian Nation of Wisconsin, AKA Oneida Tribe of Indians of Wisconsin,

Plaintiffs — Appellees,

Oneida of the Thames Council,

Plaintiff,

Thames Band of Canada (Oneida),

Plaintiff- Counter Defendant,

United States of America, New York Brothertown Indian Nation, by Maurice "Storm" Champlain, Vice Chief,

Intervenor Plaintiffs,

v.

Bond Schoeneck & King, PLLC,

Appellant,

County of Oneida, New York, County of Madison, New York,

Defendants — Third Party Plaintiffs,

State of New York,

Defendants — Counter Claimants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK (CONSOLIDATED WITH 11-3275-CV)

REPLY BRIEF FOR APPELLANT BOND SCHOENECK & KING, PLLC

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PRELIMINARY STATEMENT

This appeal asks whether it is equitable to provide a mere $5,100 to BS&K[1] for thirteen years of groundbreaking legal work that put the Oneidas on the path to vast economic success. The Oneidas distort their Retainer Agreement with BS&K as limiting the Firm's compensation to a percent of the contingency fee it would have earned but for withdrawal. The Retainer Agreement simply provides for an equitable fee to be determined by the District Court. The Oneidas also contend that the equitable fee should be based on their recovery, which they claim is limited to the rent award entered in the initial "Test Case" of the multifaceted litigation that BS&K commenced. Yet the Oneidas have always desired and even publicly praised the nonmonetary recovery that BS&K delivered. Moreover, the Oneidas' failure to recover additional damages in this action was the product of their choice, against BS&K's counsel, to pursue ejectment – a ruinous strategy that effectively discharged BS&K and led to the ultimate demise of their claims.

BS&K does not ask for an unreasonable sum or unusual relief, but simply the opportunity to present additional evidence and testimony to the District Court in favor of a fee that is more equitable than $5,100.

[1] All capitalized terms used herein shall have the same meanings provided in BS&K's principal appeal brief, dated November 17, 2011 ("Appellant's Br.").

ARGUMENT

I. THE RETAINER AGREEMENT DOES NOT LIMIT BS&K'S EQUITABLE FEE TO A PERCENTAGE OF THE ONEIDAS' RECOVERY.

A. THE UNDEFINED PHRASE "SUCH SHARE IN THE ATTORNEY FEE" IN PARAGRAPH 10 DOES NOT REFER TO THE CONTINGENCY FEE UNDER PARAGRAPH 5.

The Oneidas misconstrue Paragraph 10 of the Retainer Agreement as limiting BS&K's equitable fee to a percent of the contingency fee they would have owed BS&K if the Firm was not forced to withdraw by the Oneidas' decision to pursue ejectment. *See* Appellees' Br., 3. The Retainer Agreement contains no such provision. Paragraph 10 simply provides for "such share in the attorney fee as the court … may determine to be equitable." JA213, ¶ 10. Because Paragraph 10 does not specify how an "equitable" fee is to be determined, the fee should be determined on the basis of quantum meruit factors, like a charging lien. *See* Appellants' Br., 32 (citing cases). The Oneidas conceded below that any fee should be determined on a quantum meruit basis. Joint Opp'n[2], 2, 22-23. Yet they now claim that Paragraph 10 caps the equitable fee as a "share" of the contingency fee under Paragraph 5, which provides a fee based on a percentage of the Oneidas' recovery (JA207, ¶ 5). *See* Appellees' Br., 3.

[2] 5:70-CV-0034, DE 109.

Paragraph 10 does not refer to Paragraph 5, and the terms "such share in the attorney fee" and "equitable" are not defined. JA206-10, 213-14. Moreover, the Oneidas cannot contend that they understood those terms to mean BS&K's equitable fee was limited to a percent of the contingency fee, because the language of Paragraph 10 was supplied by the Secretary of Interior ***after*** BS&K and the Oneidas had already entered into the Retainer Agreement with different language in Paragraph 10, which read:

> If the contract shall be terminated … the Attorneys shall receive such ***compensation*** as the Secretary of the Interior or his authorized representative may determine to be equitable upon the final determination of the said claim and the controverted matters therein included, but only if terminated in such a manner as to result in a recovery for the Nation.

JA209, ¶ 10 (emphasis added). The replacement text of Paragraph 10 as imposed by the Interior Department submits determination of BS&K's equitable fee to the court instead of the Secretary of Interior and does not materially differ otherwise. The original term "compensation" is simply replaced by "such share in the attorney fee" without any definition, much less any reference to the contingency fee under Paragraph 5. There is no evidence to suggest the parties understood "such share in the attorney fee" to mean anything other than "compensation," nor would they, as a contrary interpretation would directly contradict the plain language and spirit of

Paragraph 10's submission of the fee to be determined by a third-party as a matter of equity.

The Court should also decline to interpret the undefined phrase "such share in the attorney fee" to refer to the contingency fee because of the well-established rule of construction that courts will not impose terms into a contract where none were supplied. *Wastemasters, Inc. v. Diversified Investors Servs. of N. Am.*, 159 F.3d 76, 79 (2d Cir. 1998) (even if terms are ambiguous, "courts should not rewrite the contracts before them"); *Lui v. Park Ridge at Terryville Ass'n*, 196 A.D.2d 579, 581 (2d Dep't 1993) ("A court should not, under the guise of contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract") (quotation omitted); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989) (courts should not "torture language in an attempt to force particular results or to convey delitescent nuances the contracting parties neither intended nor imagined.").

The Oneidas mistakenly rely on cases involving contingency fee agreements that, unlike Paragraph 10, provided specific amounts or formulas to determine the fee upon withdrawal. Appellees' Br., 26-27; *see also* Appellants' Br., 30-32 (distinguishing those cases). Likewise, the Oneidas quote *Fredericks v. Chemipal* at length for the proposition that a quantum meruit determination of the fee is foreclosed where "the contingent fee arrangement … specifically covered the

situation at hand." Appellees' Br., 27. Tellingly, however, the Oneidas omit Judge Lynch's remark in the same case that there remained an open question, not properly before him, as to "whether [the attorney] could be entitled to a quantum meruit recovery" for other services that were not specifically covered by the agreement. *Fredericks v. Chemipal, Ltd.*, No. 06 Civ. 966 (GEL), 2007 U.S. Dist. LEXIS 33133, *20-21 (S.D.N.Y. May 3, 2007). Here, again, Paragraph 10 does not specifically provide for any amount or formula, but simply requires an equitable fee to be determined by the court.

At the very least, any ambiguity in the text of Paragraph 10 as imposed by the Interior Department[3] warrants the evidentiary hearing that BS&K was denied.

Finally, the Oneidas' revisionist take on Paragraph 10 is meritless because it derives from the exigencies of the moment. When BS&K filed its fee application in 1999, the Oneidas were negotiating a substantial settlement with New York State (*see* Appellant's Br., 19, n. 7) and they vigorously opposed the notion that the contingency fee under Paragraph 5 could be a factor in determining BS&K's equitable fee; the Oneidas argued that any fee should be determined on a quantum meruit basis alone. *See* Appellant's Br., 33, *quoting* Joint Opp'n, 2, 22-23.

[3] In that regard, Paragraph 10 should not be construed against BS&K as drafter because the text was supplied by the Secretary of the Interior.

B. EVEN IF THE EQUITABLE FEE WERE LIMITED TO A PERCENT OF THE ONEIDAS' RECOVERY, THEIR FULL RECOVERY FAR EXCEEDS THE LIMITED RENT AWARD IN THE 'TEST CASE.'

As discussed above, Paragraph 10 of the Retainer Agreement does not confine BS&K's equitable fee to a portion of the contingency fee that, under Paragraph 5, would itself be a percentage of the Oneidas' recovery. Paragraph 10 simply requires the existence of a recovery as a condition precedent to BS&K's right to the equitable fee, and the Oneidas have indisputably achieved a recovery. The Court need look no further and therefore should reject the Oneidas' protracted arguments (*see* Appellees' Br., 40-49) that a recovery under the Retainer Agreement could only take the form of the monetary damages awarded for rent in the initial 'Test Case.' But even if BS&K's equitable fee were based on the Oneidas' recovery, the record shows that the true value of their recovery far exceeds the rent award, and that a hearing is necessary to fully appraise it.

1. The Oneidas Have Always Placed Tremendous Value on the Nonmonetary Recovery that BS&K Delivered.

From the beginning, the Oneidas well-understood that a recovery could take various nonmonetary forms, including a successful petition to federal or state authorities without litigation. *See* JA163-68. To be sure, one goal was always to obtain monetary compensation (*see* JA725, ¶ 18), but the sworn testimony of Jacob Thompson (the Oneidas' leader when BS&K was retained) makes clear that the

Oneidas dearly sought the nonmonetary recovery of finally gaining access to the federal courts in order to prove their original Indian land title:

> BS&K's task was to change long-established law and open up the courts to the Oneidas. As it turned out, BS&K was successful in doing just that, and now Indians throughout the country have access to the courts for these important claims.

JA725, ¶ 19. It cannot be forgotten that the Oneidas retained BS&K at a time when, because of the well-pleaded complaint rule, the deck was stacked so high against them that no other firm would even take the case. JA516; JA722. In that context, the prospect of a nonmonetary victory in defeating the well-pleaded complaint rule and establishing original Indian title was surely far more valuable to the Oneidas than a limited award for just two years' rent in the Test Case. That desirable nonmonetary recovery is precisely the landmark result BS&K delivered, as Thompson testified. JA725, ¶ 19.[4]

Indeed, the Oneidas' current denigration of BS&K's groundbreaking work in *Oneida I* and the subsequent proceedings before Judge Port as having little consequence or unique value (*see* Appellees' Br., 4, n. 1 & 48) is entirely inconsistent with their own prior statements. The Oneidas have long trumpeted the

[4] *See also* Hart Seely, *As For Oneida Land Claim, Somebody's Been Listening*, THE SYRACUSE POST-STANDARD, Dec. 27, 1998 ("[T]he rent wasn't an issue. Shattuck filed the claim to see if federal courts would accept the authority of determining the legality of an ancient treaty … In January 1974, to the shock of communities throughout Central New York, the Supreme Court ruled for the Oneidas … In four years, the Oneidas had made staggering gains.").

results of BSK's work in public. *See, e.g.*, JA904 ("The Oneida Nation's investment of its resources in asserting and protecting its legal rights continues to set important precedents not only for the Nation and its people, but for American Indian governments and people throughout the United States. …"). The New York Oneidas' current leader, Raymond Halbritter, has even been quoted as saying, "[BS&K attorney] George Shattuck[5] opened a door." Sean Kirst, *Lawyer Blazed Trail for Indians – Oneidas' Unlikely Ally Writes Story of Case Setting Land Rights*, THE SYRACUSE POST-STANDARD, July 5, 1991.

Additionally, when it suited their position in prior litigation before this Court, the New York Oneidas argued that the decisions obtained by BS&K before the Supreme Court and Judge Port had tremendous value. Specifically, in the brief they filed on or about April 9, 2007 in *Oneida Indian Nation v. Madison County*, No. 05-6408-cv (L) (2d Cir. filed Nov. 28, 2005) (opposing counties' appeal from prohibition of tax foreclosure on reacquired Oneida lands) (the "Oneidas Tax Br."), the New York Oneidas repeatedly advised this Court that it was BS&K's lasting victories before the Supreme Court and Judge Port which established their original Indian title and opened the door for their prosperity. *See, generally,* Oneidas Tax Br., 66-85. For example, they stated:

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[5] George C. Shattuck, Esq., was the architect of the successful strategies that BS&K pursued to victory before the Supreme Court and Judge Port. JA154-202.

- "The Oneidas began [to reacquire land] a few years after the Supreme Court decided in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), that New York's purchases and conveyances of Oneida land some 200 years ago violated federal restrictions on alienation of the land." Oneidas Tax Br., 4.

- "Under the Constitution, only the federal government can authorize the conveyance of land owned by an Indian tribe and thereby extinguish Indian title. *Oneida II*, 470 U.S. at 233-35; *Oneida I*, 441 U.S. at 667. … [The Non-Intercourse Act] categorically prohibits the conveyance of land held by an Indian tribe, absent the requisite approval, and provides there is no legal or equitable exception…" *Id.* at 66.[6]

- "Nothing in the Supreme Court's *City of Sherrill* decision or this Court's subsequent decision in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), calls into question this Court's holding regarding continuing federal restrictions on the alienability of land in Oneida possession." *Id.* at 68.

The New York Oneidas also argued that the reservation status of their lands has key consequences well beyond taxability: "Although because of the state tax exemption statutes that cover reservation land owned by an Indian tribe, reservation status turned out to have consequence to the question of the taxability of reacquired Oneida lands, ***reservation status also is relevant to a broad range of issues***…" Oneidas Tax Br., 81 (emphasis added). BS&K readily agrees with that

[6] It was BS&K's work before the Supreme Court and at trial before Judge Port that established the supremacy of Indian title under the Nonintercourse Act as a matter of controlling law. *See* Appellant's Br., 14-17.

statement (*see* Appellant's Br., 49-52).[7] There can be no real dispute that the recognition of the Oneida lands' reservation status was due to BS&K's work.

Pointing to Judge Port's 1977 decision, the New York Oneidas also refuted the Counties' claim that their reservation was disestablished by the 1838 Treaty of Buffalo Creek, asserting: "The Counties lost the argument that the Treaty of Buffalo Creek approved earlier conveyances of Oneida land in the Oneida test case, *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977), and are bound by that ruling, which they did not appeal." *See* Oneidas Tax Br., 67, n. 19; *id.* at 79, n. 22 (same). The Oneidas now make the opposite claim, however: "This Court's 2003 decision in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), not the Test Case, confirmed that the Oneida reservation had not been disestablished." Appellees' Br., 48.

The Court largely agreed with many of the New York Oneidas' foregoing statements. *See, e.g.*, *Oneida Indian Nation v. Madison County*, No. 05-6408-cv (L), 2011 U.S. App. LEXIS 21210, *10-11 (2d Cir. Oct. 20, 2011) (non-alienability of original Indian land under Nonintercourse Act); *id.* at *94-96 ("It remains the law of this Circuit that the Oneidas' reservation was not

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[7] Indeed, in addition to establishing and operating their casino, reservation status has enabled the New York Oneidas to recently begin manufacturing and selling tax-free cigarettes. Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, THE NEW YORK TIMES, Feb. 22, 2012.

disestablished") (quotation omitted). Thus, the Oneidas' inconsistent statements debasing the value of BS&K's work should be rejected out of hand. The New York Oneidas in particular should be held judicially estopped from making these statements, like the Court held in the tax case: "The OIN is bound by the doctrine of judicial estoppel." *Id.* at *40, *citing New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position…").

In any event, the fact that the Oneidas are even able to make the cynical and disingenuous argument that BS&K's work lacks significant and unique value cries out all the more for the evidentiary hearing that BS&K was denied, as it would have given BS&K the opportunity to develop and submit additional proof (including by cross-examining the Oneidas' witnesses with their inconsistent prior statements) of the real and lasting value of the landmark results the Firm delivered.

2. This Action was Dismissed Because of the Oneidas' Disastrous Choice to Seek Ejectment.

As discussed above, the Oneidas well-understood the significance of a nonmonetary recovery, as they had retained BS&K to defeat the jurisdictional barrier and establish original Indian title, not just to collect rent. The Oneidas' instant claim that a recovery was limited to rent damages is also belied by their own amendment of the complaint in this action, in 2002, to seek both "monetary

and possessory relief, including ejectment..." *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 121 (2d Cir. 2010). Indeed, it was their decision to pursue that disruptive form of nonmonetary relief which forced BS&K's withdrawal in 1978 (*see* Point III(A), *infra*) and ultimately led to the Court's dismissal of this action in 2010.

From the beginning, BS&K repeatedly counseled against ejectment (*see* JA163, ¶ 30; JA169, ¶ 52) for the same reason succinctly given by the District Court in finally dismissing this action, namely: "Past injustices suffered by the Oneidas cannot be remedied by creating present and future injustices." *Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128, 137 (N.D.N.Y. 2007). When Shattuck argued the case before the Supreme Court in 1973, he repeatedly assured the Court that the Oneidas did "not seek to eject either the counties or anybody else." JA178, ¶ 73; *see also* JA181, ¶¶ 80-81. His strategy of "first do no harm" worked and the courts were receptive to incremental rent claims.

The Oneidas abandoned such self-restraint, however, after BS&K's victories before the Supreme Court in *Oneida I* and at trial before Judge Port. JA726-27, ¶¶ 24-26. Notwithstanding BS&K's longstanding warning of "intense political opposition" (JA169, ¶ 52), the Oneidas pursued ejectment in two lawsuits filed in 1978 and 1979 that sought, *inter alia*, to dispossess nearly 60,000 landowners, including individuals and private businesses. Both were dismissed by District

Court Judge Neal P. McCurn, who pointedly warned the Oneidas that he was "keenly aware of the serious, if not insurmountable, problems which would arise out of granting … the return of land which has been highly developed since it was last inhabited by [them]." *Oneida Indian Nation v. New York*, 520 F. Supp. 1278, 1296 (N.D.N.Y. 1981), *aff'd in part, remanded in part by* 691 F.2d 1070 (2d Cir. 1982).

In 2000, Judge McCurn similarly denied the Oneidas' attempt to amend the complaint in this action to seek ejectment of 20,000 private landowners because it was "futile" and pursued in "bad faith." *Oneida Indian Nation of New York State v. County of Oneida*, 199 F.R.D. 61, 79-106 (N.D.N.Y. 2000) ("ejectment is not a viable remedy here…").[8] Undeterred, the Oneidas still pursued ejectment against the State and drastically expanded the scope of this action. *E.g.*, 617 F.3d at 120-21. Finally, nearly thirty years after Judge McCurn had warned the Oneidas that ejectment risked "utter chaos" (520 F. Supp. at 1295), this action succumbed at last to the Oneidas' constant overreaching and their claims were dismissed under a new

[8] A separate ejectment lawsuit by the Wisconsin Oneidas against private landowners was subsequently dismissed by District Court Judge Kahn for the same concerns. *Oneida Tribe of Indians v. AGB Props.*, Lead No. 01-CV-233, 2002 U.S. Dist. LEXIS 16538, *25-26 (N.D.N.Y. Sept. 5, 2002) ("The time has come to put an end to the tactics long employed by the Oneida Plaintiffs in these land claim actions that are meant only to scare the local population…").

laches theory based on the disruptive nature of the requested relief. *See* 617 F.3d at 127-28, *citing Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

None of this remarkable reversal of fortune can be attributed to BS&K, which was forced to withdraw in 1978 by the Oneidas' pursuit of ejectment (*see* Point III(A), *infra*). At that time, BS&K had obtained the Oneidas' desired nonmonetary recovery and positioned them for continued success in federal court with a proven strategy based on original Indian title and incremental rent claims against municipalities. Again, BS&K had made new law in the land that aboriginal claims were not barred by the well-pleaded complaint rule; proven the Oneidas' original Indian land title and that it was alienable only by Act of Congress; and established the viability of a rent claim against the Counties and the availability of money damages. Significantly, BS&K had also defeated the laches defense by proving at trial that the Oneidas never abandoned their claims. *See Oneida Indian Nation of N.Y. State v. County of Oneida*, 434 F. Supp. 527, 541 (N.D.N.Y. 1977). At that time, of course, there was far less concern that the Oneidas' claims would rip the fabric of society because they had followed BS&K's advice to deliberately avoid ejectment and sue only the government. Thus, as of 1978, BS&K had made the law of this Circuit favorable to the Oneidas' continued success in collecting rent from municipalities.

In short, it was the Oneidas' own decision to abandon BS&K's proven strategy for success that led to the ultimate demise of their case. It would be profoundly inequitable for BS&K's fee to be diminished by the result of the Oneidas' decision to ignore all the warnings and drive the disruptive theory of ejectment to its natural end. As the Court has held before, this is exactly why "a court ought not to consider the former client's actual recovery in determining quantum meruit fees." *Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259, 264-65 (2d Cir. 2004) (quoting New York Court of Appeals' explanation that "[the] principle [is] inherently designed to prevent unjust enrichment … [and] to deter clients from taking undue advantage of attorneys"). Hence, even if BS&K's equitable fee is to be measured as a share of the Oneidas' recovery, their recovery extends well beyond – and must not be confused with – the result which they forced in this action.

Finally, for all of the foregoing reasons (*i.e.*, in Point I(A)-(B), *supra*), the Court should disregard the Oneidas' unsupported claim[9] that BS&K's equitable fee must be the lesser of quantum meruit or the *pro rata* contingency fee it would have earned but for withdrawal (Appellees' Br., 29). Again, Paragraph 10 does not

[9] The Oneidas cite only to a Restatement and identify no case applying it. The proffered rule does not appear to squarely address fee agreements that provide for an equitable fee. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 40 (2000), cmt. a ("The rules set forth here apply when the lawyer seeks to recover a fee and when the client, having paid in advance or otherwise, claims a refund.").

define the equitable fee as a percent of the contingency fee, but that contingency fee would surely have been substantial if the Oneidas had stayed on the path rather than pursuing ejectment of private landowners and forcing BS&K to withdraw.

II. BS&K DOES NOT SEEK EXTRACONTRACTUAL RELIEF, BUT TO ENFORCE ITS RIGHT UNDER THE RETAINER AGREEMENT TO AN EQUITABLE FEE.

A. INTRODUCTION: MANY OF THE ONEIDAS' CLAIMS ARE MERITLESS AND HAVE BEEN WAIVED.

On this appeal, BS&K seeks to enforce the provisions of Paragraph 10 of the Retainer Agreement for an equitable fee. *See, e.g.*, Appellant's Br., 22-23, 30-33. Much of the Oneidas' opposition, however, is predicated on a fundamental distortion of BS&K's claim as seeking extracontractual relief in the form of quantum meruit damages, rather than the contractual remedy of an equitable fee expressly supplied by the Retainer Agreement. *See, e.g.*, Appellees' Br., 22-28. The notion that BS&K advances "a distinct extra-contractual claim" (*id.* at 25, n. 8) is incorrect. While BS&K has always maintained that the amount of the equitable fee under Paragraph 10 could be determined by, *inter alia*, applying traditional quantum meruit factors, that does not mean that the Firm seeks extracontractual relief. Thus, the Oneidas' arguments against extracontractual damages lack merit, as more specifically addressed in subpoints (B) – (D), below.

In addition, many of the Oneidas' arguments are foreclosed on this appeal because they would resurrect issues decided against them by the lower court. The

Oneidas filed no objections to the R&R and therefore waived any review of Magistrate Judge Treece's holdings. *FDIC v. Hillcrest Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995) ("failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision") (quotation omitted). Similarly, because the Oneidas took no cross-appeal from the Decision adopting the R&R, they are precluded by the "inveterate"[10] cross-appeal rule from now "advanc[ing] a theory that challenges some aspect of the lower court's judgment." *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 349 (2d Cir. 2008); *see also Standard Inv. Chartered, Inc. v. NASD*, 560 F.3d 118, 126 (2d Cir. 2009) ("An appellee may not seek to enlarge its rights under a judgment on appeal without taking a cross-appeal.").

B. BS&K HAS NOT WAIVED THE APPLICATION OF QUANTUM MERUIT FACTORS TO DETERMINE ITS EQUITABLE FEE UNDER THE CONTRACT.

BS&K seeks to enforce Paragraph 10 of the Retainer Agreement and thus does not dispute Magistrate Judge Treece's finding that Paragraph 10 controls the right to an equitable fee. BS&K appeals because the method that he applied to calculate the equitable fee *sua sponte* reached an inequitable result. Magistrate Judge Treece erroneously held that a quantum meruit analysis was precluded under two inapposite cases involving contingency fee agreements which explicitly did

[10] *Greenlaw v. United States*, 554 U.S. 237, 244-47 (2008) (declaring cross-appeal rule to lack exception even for plain error by the district court).

not provide for an equitable fee upon termination, unlike Paragraph 10. *See* Appellant's Br., 30-31. Thus, the Oneidas are incorrect to claim that BS&K waived any issue for not objecting to Magistrate Judge Treece's finding that Paragraph 10 governs the right to a fee (Appellees' Br., 22-25).

Moreover, contrary to the Oneidas' claim that "BS&K has dramatically changed its theory on appeal" (*id.*, 24), BS&K consistently argued below that the Firm is contractually entitled to an equitable fee that can be determined on the basis of quantum meruit factors. *See* BS&K Mem.[11], 15, n. 21 & 18-22; BS&K Reply Mem.[12], 34-35; Objections Br.,[13] 9-10, 16-18. BS&K thus preserved the argument. *See, e.g.*, *Long Island Airports Limousine Serv. Corp. v. Playboy-Elsinore Assocs.*, 739 F.2d 101, 104 (2d Cir. 1984) (no waiver because "[t]o the extent that the appellant's brief raises different arguments in support of the same conclusions and claims, it simply reflects an attempt to address the specific reasoning of the district court."). Furthermore, the implication that the prospect of a quantum meruit analysis was never raised prior to this appeal is simply incorrect, as the Oneidas themselves argued that any fee should be determined on a quantum meruit basis. *See* Appellant's Br., 33, *quoting* Joint Opp'n at 2, 22-23.

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[11] 5:70-CV-0035, DE 55.

[12] 5:70-CV-0035, DE 112.

[13] 5:70-CV-0035, DE 126.

C. BS&K'S CLAIM TO ENFORCE THE RETAINER AGREEMENT IS NOT TIME-BARRED.

The Oneidas conceded below that BS&K's equitable fee under Paragraph 10 of the Retainer Agreement should be determined on a quantum meruit basis and did not argue that the Firm's right to a fee was time-barred. *See* Joint Opp'n, 22-23. Any statute of limitations defense was therefore waived. *See Camp, Dresser & McKee, Inc. v. Technical Design Assoc., Inc.*, 937 F.2d 840, 843 (2d Cir. 1991) ("failure to raise the statute of limitations defense below constitutes a waiver of the defense"). The statute of limitations for claims seeking extracontractual relief (Appellees' Br., 36) has no application in any event, as BS&K seeks to enforce its contractual right to an equitable fee under Paragraph 10. Moreover, Paragraph 10 makes the right to a fee contingent upon a recovery. JA214. The Oneidas claim their only recovery was the Counties' payment of $57,495 in 2004. Appellees' Br., 5, 45-46. Thus, by their own argument, BS&K's fee application could not be time-barred as it was filed in 1999; indeed, the Oneidas argued below that it was premature. *See* Joint Opp'n, 8-9.[14] Magistrate Judge Treece disagreed (SA20) and the Oneidas filed no objections, waiving review. Point II(A), *supra*.

[14] On that note, their current argument that BS&K's withdrawal in 1978 operated as "an election to accept a portion of a contingent fee paid to successor counsel rather than a quantum meruit fee" (Appellees' Br., 25, n. 7) cannot be reconciled with their arguments below that BS&K's contractual claim for an equitable fee was premature until the Counties paid rent in 2004 and that any fee should be determined on a quantum meruit basis.

D. THE ONEIDAS WAIVED THE DEFENSE OF TRIBAL SOVEREIGN IMMUNITY.

Because BS&K's claim for an equitable fee is brought under Paragraph 10 of the Retainer Agreement, the Oneidas' argument that tribal sovereign immunity bars extracontractual relief (*see* Appellees' Br., 32-35, 45-46) is meritless. It has been waived in any event (Point II(A), *supra*) because the Oneidas filed no objections to Magistrate Judge Treece's holding that they explicitly waived sovereign immunity under Paragraph 10. SA21-23, *citing C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 420-22 (U.S. 2001). Furthermore, even if BS&K's claim under the Retainer Agreement did seek extracontractual damages, the Oneidas' waiver of sovereign immunity would still bar their defense to that type of related, ancillary relief. *See C & L Enters.*, 532 U.S. at 419-23 (tribe's entry into contract containing standard arbitration clause constituted waiver of sovereign immunity not only to arbitration of disputes but also to judicial enforcement of any ensuing arbitration award).

III. BS&K DID NOT FORFEIT ITS RIGHT TO AN EQUITABLE FEE BY ANY ALLEGED CONFLICT OR DISLOYALTY.

A. BS&K WAS EFFECTIVELY DISCHARGED WHEN THE ONEIDAS DECIDED TO PURSUE A THEORY OF RECOVERY THAT THEY HAD EXPRESSY AGREED WOULD REQUIRE THE FIRM'S WITHDRAWAL.

Magistrate Judge Treece held that BS&K had no conflict of interest at the outset of representing the Oneidas and that BS&K's withdrawal was not improper.

See SA27-35; SA38-39. The Oneidas now repeat their meritless arguments to the contrary (Appellees' Br., 7-10, 29-32, 49-51), but have waived review by failing to object to the R&R and cross-appeal. Point II(A), *supra*.

Nor do these issues provide independent basis to affirm, as the record shows that, from the beginning, the Oneidas understood and agreed that the Firm could never sue private landowners out of concerns for potential conflicts of interest. *See* JA156-57, ¶¶ 6, 11; JA421; JA492; JA724, ¶¶ 16-18; JA726-27, ¶¶ 24-25. The Retainer Agreement itself makes clear that BS&K's representation was limited to "claims of the Nation against the State of New York." JA206-07, ¶¶ 1, 4. Hence Magistrate Judge Treece correctly concluded that "the evidence in the record supports BSK's assertion that it disclosed its own interest in the land and explained why it could not and would not sue individual landowners due to such conflicting interests, and that the Nation consented…" SA32. For the same reason, Magistrate Judge Treece was also correct to reject the Oneidas' argument "that BSK's entering in the Retainer Agreement despite the conflicts of interest that existed constituted wrongdoing under Paragraph 10 because BSK's conflicts were foreseeable and their withdrawal was therefore without just cause." SA38.

Likewise, Magistrate Judge Treece correctly disregarded the Oneidas' claim that the Firm's withdrawal was due to an alleged perception of diminishing returns, as BS&K indisputably had the right to withdraw for any reason under Paragraph

10. SA38-39. Moreover, the memoranda from Shattuck to the Firm's Executive Committee are hardly as nefarious as the Oneidas' selective quotations suggest (Appellees' Br., 7-8). Taken in context, the memos reflect Shattuck's careful approach to persuading Firm management to terminate what had otherwise been, up to that point, a very successful, high-profile representation, including victories before the Supreme Court and the District Court. Shattuck thus stressed the importance of aiding the Oneidas' transition to any new counsel (JA708, ¶ 6), recited the beneficial results already obtained for them (JA707; JA709; JA489), and sought to minimize any expectation for greater potential remuneration if the Firm were to continue as counsel of record (JA705, ¶ 1; JA489). In short, the Magistrate Judge correctly rejected the Oneidas' claim that BS&K's withdrawal was improper, and the Oneidas waived review by filing no objections.

Moreover, it was the Oneidas' decision to seek ejectment that forced the Firm to withdraw in 1978. *E.g.*, JA727, ¶ 26. As discussed above, the Oneidas were advised many times and expressly agreed that BS&K could never represent them in actions against private landowners. After BS&K won *Oneida I* and established the Counties' liability before Judge Port, however, the Oneidas chose to take that very path (*id.*; *see also* Point I(B)(2), *supra*), and, as Magistrate Judge Treece held, the "record shows that … [the Oneidas] consented to [BS&K's]

withdrawal." SA38. By forcing BS&K to withdraw and consenting to the same, the Oneidas effectively discharged the Firm.

The Oneidas are thus far too quick to distinguish BS&K's proffered authority (Appellant's Br., 25-26) for the application of quantum meruit factors in contingency fee cases simply because those cases involved discharged attorneys. *See* Appellees' Br., 30. The New York Court of Appeals has identified numerous reasons, including conflicts of interest, that constitute just cause for an attorney's withdrawal without forfeiting the right to a fee. *Klein v. Eubank*, 87 N.Y.2d 459, 463-464 (N.Y. 1996) ("operative pragmatic and public policy considerations" require preserving attorney's right to statutory charging lien where representation ends due to, *inter alia*, conflicts of interest) (cited in Appellees' Br., 30). Thus it is beyond cavil that a "firm terminate[s] its representation for just cause" under New York law where (as here) withdrawal is "based on a conflict of interest which compromise[s] its ability to provide adequate representation." *Schneider, Kleinick, Weitz & Damashek v. Suckle*, 80 A.D.3d 479, 480 (1st Dep't 2011); *see also Heck-Johnson v. First Unum Life Ins. Co.*, No. 9:01-CV-01739 (GLS/RFT), 2006 U.S. Dist. LEXIS 26265, *10 (N.D.N.Y. May 4, 2006) (conduct tantamount to "a conflict of interest establish[es] good cause to withdraw.").

Perhaps the Oneidas have said it best themselves: a quantum meruit-based fee should be paid where, as here, "the client destroys the attorney-client

relationship, forcing the lawyer to withdraw," so as to prevent that "client from abusing the absolute right to discharge a lawyer by retaining the benefits of [the] lawyer's services without payment." Appellees' Br., 31.

B. AS HELD BELOW, BS&K DID NOT FORFEIT ITS RIGHT TO A FEE DUE TO ANY SUPPOSED DISLOYALTY.

Magistrate Judge Treece held that the Oneidas' allegations of disloyalty warranted a ten-percent reduction to BS&K's fee, not complete forfeiture. SA52-53; SA56. Because the Oneidas failed to object to the R&R and took no cross-appeal, their argument that BS&K forfeited its fee by the alleged disloyalty (Appellees' Br., 49) was waived. Point II(A), *supra*. Furthermore, the Oneidas' contentions provide no independent basis to affirm. Magistrate Judge Treece described the disloyalty as predicated on two discrete claims: "(1) [BS&K] seeking to re-enter the Reservation Case in 1990 as counsel for the WI or CAN Oneidas, but not the NY Oneidas; and (2) advising the CAN Oneidas to join a lawsuit against the NY Oneidas in order to close down Turning Stone Casino in New York." SA41. The record refutes both claims.

First, BS&K did not wish to re-enter any litigation but desired to serve on the Oneidas' negotiating team in settlement discussions with New York State. *See* JA536; JA538 ; JA551. BS&K repeatedly disavowed any notion of representing one band of the Oneidas against the others (JA536; JA569; JA590-93; JA629) and advised that each band needed independent counsel to separately represent its own

interests. JA536; JA551. Most of all, BS&K constantly counseled the need for unity in negotiating with New York State, even as the State attempted to play the New York Oneidas against the others. JA579-80. When BS&K was retained in a consulting capacity by the Canadian Oneidas on a simple invoice basis in 1994 (JA652),[15] the Firm continued to stress a unified approach. JA656. In response to the New York Oneidas' objection to that consulting agreement, Shattuck reiterated that BS&K would never "give advice or counsel adverse to the Oneida Indian Nation of New York or the Oneida Nation of Indians of Wisconsin" and restated his view "that all Oneidas are interested in effectuating a settlement of their claim against New York State." JA660-61. The New York Oneidas never responded or complained again until BS&K applied for its fee under the Retainer Agreement – much less explained how a call for unity could be an act of disloyalty.

Second, BS&K never advised any party to join in any litigation against the New York Oneidas. To be sure, it was suggested to the Canadian Oneidas in August 1993 (JA609) that they join an action filed in the Northern District of New York, captioned *Homer v. Halbritter*. JA597. But that litigation was effectively an action ***by*** the New York Oneidas against Ray Halbritter, who was never a BS&K client. According to the complaint, Halbritter had been removed from the New

[15] Magistrate Judge Treece found that BS&K and the Canadian Oneidas entered into a formal retainer agreement (SA44), but the draft agreement was never signed.

York Oneidas' leadership in April 1993. JA600, ¶ 12. The complaint thus sought to protect the New York Oneidas against Halbritter's subsequent, unauthorized contracts for the Turning Stone Casino on Oneida lands. JA599-600, ¶¶ 7-10; JA601, ¶ 12. The Canadian Oneidas were encouraged to join the New York Oneidas' lawsuit against Halbritter to protect all Oneidas' unified interests in tribal lands in which they held a communal interest.[16] JA609-10. Shattuck even recommended that the Canadian Oneidas should seek representation by Bertram Hirsch, Esq., whom Shattuck understood to be the New York Oneidas' attorney. JA611.[17] In short, BS&K never advised any party to litigate against the New York Oneidas, contrary to the self-serving claims of their current leadership[18] (which would have been explored at an evidentiary hearing), and the Canadian Oneidas did not join their lawsuit against Halbritter in any event.

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[16] *See, e.g., New York Indians v. United States*, 40 Ct. Cl. 448 (Ct. Cl. 1905) (Oneidas as communal owners); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 259 (West Publ'g Co. 2d ed. 1988) (1981) ("Virtually all of the cases dealing with original Indian title … have viewed such title as being that of the tribe, rather than its individual members.").

[17] Mr. Hirsch had become the New York Oneidas' counsel of record after BS&K withdrew. *E.g., Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988). He was listed as one of their attorneys in the *Homer* complaint, JA597, but recently claimed that was in error. *See* 5:70-cv-0035, DE 129.

[18] The leadership struggle came to an end when Halbritter was reinstated as the New York Oneidas' leader in November 1993. David Tobin, *Making Dollars and Dissent – Ray Halbritter has Been Dogged by Opposition Almost from the Beginning*, THE SYRACUSE POST-STANDARD, Oct. 10, 1995.

Finally, even if the alleged disloyalty were factually supported, it would still be insufficient to justify the forfeiture of BS&K's equitable fee as a matter of law. Courts have long recognized an exception to the duty of loyalty under New York's Disciplinary Rule 5-108(A) (the then-applicable ethical rule) for situations where, as here, an attorney previously and concurrently represented two commonly-interested clients, "one of whom is now complaining." *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977). *See also Pacheco Ross Architects v. Mitchell Assoc. Architects*, No. 1:08-CV-466 (GTS/RFT), 2009 U.S. Dist. LEXIS 45294, *10-11 (N.D.N.Y. May 29, 2009); *I Successor Corp. v. The Feld Group, Inc.*, 321 B.R. 640, 655 (Bankr. S.D.N.Y. 2005); *In re Rite Aid Corp. Securities Litigation*, 139 F. Supp. 2d 649, 656-57 (E.D. Pa. 2001). Moreover, BS&K's work for the Oneidas in defeating the jurisdictional barrier to federal court and establishing original Indian title can hardly be deemed, for purposes of DR 5-108, "identical" or "essentially the same" as the New York Oneidas' lawsuit against Halbritter. *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (2d Cir. 1979). There was no disloyalty sufficient to warrant forfeiture of BS&K's fee.[19]

[19] Additionally, the fee would not be forfeited unless the alleged disloyalty "relate[d] to the representation for which the fees are sought." *Matter of Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Assoc.*, 41 A.D.3d 367, 370 (1st Dep't 2007). Here, any supposed disloyalty occurred long after BS&K withdrew.

IV. BS&K CONSISTENTLY REQUESTED AN EVIDENTIARY HEARING BELOW.

The Oneidas argue that BS&K waived an evidentiary hearing by failing to request it below (Appellees' Br., 37-38), but the record is clear that, from the outset, BS&K repeatedly sought permission to submit evidence after its right to a fee was recognized. Appellant's Br., 19, 21-23 (citing record). Additionally, the Oneidas do not and cannot dispute that an astonishing amount of time passed between the filing of BS&K's application in 1999 and the lower court's sudden issuance of the R&R in 2011, without any additional briefing on the change in events during the intervening years or even oral argument. The denial of any opportunity to be heard was basic prejudicial error.

V. PREJUDGMENT INTEREST IS MANDATORY.

BS&K applied below for an order solely recognizing the right to a fee. The Firm expressly requested that the amount of the fee be determined later, after the submission of additional evidence. JA251. BS&K preserved its claim for prejudgment interest on the fee by objecting in total to every part of Magistrate Judge Treece's *sua sponte* determination of the amount of the fee. Objections Br., 1 & 7-8. Moreover, the courts do not require, as the Oneidas contend (Appellees' Br., 39-40), separate damages for breach of contract before awarding prejudgment interest on a fee motion under CPLR § 5001. It is mandatory and assessed from the date of withdrawal. *See, e.g., D'Jamoos v. Griffith*, 340 Fed. Appx. 737, 742

(2d Cir. 2009) (summary order) (affirming award of prejudgment interest from the date of discharge); *see also Simon v. Unum Group*, No. 07 Civ. 11426 (SAS), 2010 U.S. Dist. LEXIS 62661, at *11-12 (S.D.N.Y. June 23, 2010).

CONCLUSION

BS&K respectfully requests that the Decision be reversed and remanded for an evidentiary hearing.

Dated: February 29, 2012

Respectfully,

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Dated: February 29, 2012